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IN THE

Supreme Court of the United States

October Term, 1964

No. 752

NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC., INGE AND COMPANY, INC., BARR SHIPPING COMPANY, INC., MAJOR FORWARDING COMPANY, INC. and JOHN H. FAUNCE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

REPLY BY PETITIONERS

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This reply to respondents' brief is submitted on behalf of petitioners pursuant to Rule 24(4) of this Court.

Argument

Under their Point 2 respondents maintain that the Commission may prescribe reasonable rules and regulations under 46 U. S. C. 811b(c) governing the conduct of forwarders, even though there has been no agency finding of a statutory violation (Resp. Br., pp. 7, 11). This contention is squarely at variance with the legislative history of the act and pronouncements of this Court.

As respondents note in their brief (Resp. Br., p. 6) the regulatory authority given to the Commission in the Freight Forwarder Law of 1961 was to prevent "malpractices"

(S. Rept. No. 691, 87th Cong., 1st Sess., p. 7). The grant of such authority was in accord with the view of this Court in *California* v. *U. S.* 320 U. S. 577 to the effect that if the agency "found disobedience of the law" (p. 583) it could then define the outer bounds of permissible conduct.

Despite the clear Congressional expression that the authority given was to prevent "malpractices" and in the face of this Court's mandate that the Commission was preliminarily required to find a "wrong" or "disobedience of the law", respondents assert that the challenged rules may be upheld if they are "reasonable and necessary to implement the shipping laws" (Resp. Br., p. 8).

The assertion of such rulemaking power is ultra vires. While an agency may issue rules to fill in the interstices of the statute, nevertheless, the agency's administrative powers to do so are "limited by the scope of the statute." *Texaco, Inc.* v. *F. P. C.*, 317 F. 2d 796, 806. Respondents reject such limitation, insisting in effect that the Commission may adopt any rule whatsoever governing the conduct of forwarders, so long as it meets the vague standard of being "reasonable and necessary to implement the shipping laws." But it is not enought that the rules are reasonable and implementative. They must be "limited to filling in details within the framework of the statute." Otherwise, the agency is not making rules; it is legislating. *American President Lines, Inc.* v. *Mackey, et al.*, 120 F. Supp. 897, 899. Unless the decision below is reversed, under the broad "implementative" rule making power respondents assert herein, the agency will be a super Congress with unlimited power to legislate without regard to the statute.

American Trucking Assns. v. *U. S.*, 344 U. S. 298, relied upon by respondents (p. 7) is not contrary to the position of petitioners herein. Even though the practice of "trip-leasing" was not specifically prohibited by the statute this Court noted that the rule was intended to ban practices

that lead to violations of the statute's provisions and that "practically the entire regulatory scheme is affected by trip-leasing" (pp. 311-312).

a. *Rule 510.21(1).* To support the rule banning the financing of a shipment by a forwarder, respondents point to a statement in the Senate report to the effect that "a lien on a shipment could give a freight forwarder sufficient beneficial interest in the shipment to cause payments thereon by the carrier to the forwarder to be a form of indirect rebate of the freight." Based on this cryptic statement, respondents maintain that "any lien interest" in a forwarder from financing is automatically a "beneficial interest", thus barring the licensing of a forwarder who has for generations provided a useful way of expediting our foreign sales by advancing the purchase price.

Respondents read too much into the legislative history. The Senate Committee did not say that every lien was a beneficial interest. It said that a lien "could" give a freight forwarder such interest. Obviously, the Committee had in mind the possibility that upon the exercise of a lien, a forwarder could obtain an equity interest in the goods so that a brokerage payment by a carrier might be a rebate. But if a forwarder does not foreclose on his lien for advancing freight, obviously the possibility of rebate is nonexistent.

What the Commission has done is erroneously and without foundation assumed that every lien for advancing the purchase price gives rise *ipso facto* to an equity in the goods, while at the same time excluding in the rule a lien for advancing out of pocket disbursements, such as the ocean freight. If Congress intended to ban all liens, there is no basis for the exclusion of a lien for disbursements. On the other hand, if Congress did not so intend, it is unreasonable and arbitrary to ban a lien for financing a shipment without a scintilla of evidence to support the proposition that

the lien alone will result in a beneficial interest in the licensee.

Petitioners do not disagree with what respondents state as the rule's purpose, that is, "to prevent forwarders, who in reality own goods in the guise of financing, to use this subterfuge to obtain a discounted freight rate" (Resp. Br., p. 9). The difficulty is that the rule goes too far; it also bars financing by forwarders who do not engage in the activity to obtain rebates, but rather to accommodate their overseas purchasers by making funds immediately available to pay the American supplier.

b. *Rule 510.22(a).*—Respondents seek to justify this rule, which denies compensation authorized by law, on the theory that it prevents forwarders in one port controlling cargo from bypassing forwarders in an outport by using a carrier to render a forwarding service (Resp. Br., p. 9).

Respondents do not claim that the use of a carrier in an outport is unlawful under the statute, as indeed it is not. Instead they point to a requirement in the Freight Forwarder Law (§ 44(b)) to the effect that in the issuance of a license the Commission must find that the proposed forwarding business is or will be consistent with the Merchant Marine Act, 1936.

The short answer is that a finding of consistency with the 1936 Act is required in the *issuance of a license* to a forwarder, not in his conduct subsequent thereto. The agency policy determination to penalize a forwarder by depriving him of earned revenue if he employs a carrier in the outport has no basis in the statute and is a "legislative act," hence unlawful. *International Brotherhood of Teamsters, etc.* v. *N.L.R.B.*, 365 U. S. 667, 674.

c. *Rule 510.23(j)*—While asserting that "the finding of a statutory violation is not a necessary prerequisite to the promulgation of rules" (Resp. Br., p. 11), respondents nevertheless contend that Rule 510.23(j) is intended to

prevent the "evil" of discrimination in charges between shippers which "could amount to an unreasonable preference or advantage in violation of Section 16 (First) of the Shipping Act of 1916" (Resp. Br., p. 10).

Respondents would carry water on both shoulders. They do not concede the necessity of a finding of unlawful conduct as the basis of the rule, yet they urge its support as an attempt "to eliminate unreasonable preferences" under the statute. Respondents may not have it both ways. If the rule is designed to prevent unlawful conduct under the "undue prejudice" part of Section 16 (First), then all of the long standing evidentiary tests for such a violation must be met (See Pet. No. 752, pp. 12-13). The court below has conceded that one essential element, proof of competitive relationship between shippers, has not been met (Pet. No. 752, p. 38). On the other hand, if a finding of illegality is unnecessary, we are at a loss to understand why respondents seek to justify the rule as an attempt to eliminate an unreasonable preference in violation of Section 16 (First).

Respondents further contend that the issue of illegality need not be reached because the Court of Appeals noted (Pet. No. 752, p. 38) that "the rule is fully justified as a prophylactic measure". (Resp. Br., p. 11, fn. 3). This is a startling basis for rule making. It would appear that any regulation, according to respondents, which has a prophylactic effect is lawful, regardless of whether it has a basis in law and is within the granted authority (*See Social Security Board* v. *Nierotko*, 327 U. S. 358). Petitioners are aware of no such revolutionary doctrine with respect to a regulatory agency's rule making power and respondents offer no supporting authority.

d. *Rule 510.25(a)*—Respondents deny that this rule will force a licensee to furnish information in violation of Section 20 of the Shipping Act on the ground that the rule defines "special contract" as limited to "financial arrange-

ments". The difficulty with this position is that the "special contract" is not so limited in practice. (See Pet. No. 752, p. 17). Of necessity, such contract contains information covered in Section 20 and if an outside party can examine such a contract, the licensee is compelled to violate the section.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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